

Integr

**B. K. Schafer
Senior Counsel**

**Office of the Assistant General Counsel
(Installations and Environment)**

schafer.bernard@hq.navy.mil

Key Environmental Laws & Regulations & Executive Orders*

AHERA	Asbestos Hazard Emergency Response Act (a part of TSCA) (15 USC 2641-2654; 40 CFR 761)
CAA	Clean Air Act (42 USC 7401-7642; 40 CFR 53; EO 12843, EO 12844)
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601-9675; 40 CFR 300; EO 12580)
CZMA	Coastal Zone Management Act (16 USC 1451-1464; 15 CFR 921)
DERP	Defense Environmental Restoration Program (the IRP Program) (Title II of SARA; 10 USC 2701; EO 12580)
EPCRA	Emergency Planning and Community Right-To-Know Act of 1986 (Title III of SARA; 42 USC 11001-11050; 40 CFR 355; EO 12856)
ESA	Endangered Species Act of 1973 (16 USC 1531-1544; 50 CFR 402)
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act (7 USC 136-136y; 40 CFR 165)
FWPCA	Federal Water Pollution Control Act (aka Clean Water Act (CWA)) (33 USC 1251-1387; 40 CFR 401; EO 11288, EO 11990, EO 11988, EO 12777, EO 12902)
HMTA	Hazardous Materials Transportation Act (49 USC 5101; 49 CFR 171)
HSWA	Hazardous and Solid Waste Amendments of 1984 (amended SWDA/RCRA)
IRA	Indoor Radon Abatement Program (a part of TSCA, at 15 USC 2661)
LBPRA	Lead-Based Paint Exposure Reduction Act (a part of TSCA at 15 USC 2681; 40 CFR 745)
LBPPA	Lead-Based Poisoning Prev. Act (42 USC 4801; 24 CFR 34-38 & 40 CFR 745)
MMPA	Marine Mammal Protection Act (16 USC 1361; 50 CFR 216.1, 228.1)
MPRSA	Marine Protection, Research and Sanctuaries Act (source of Ocean Dumping Act & National Marine Sanctuaries Act)
MWTA	Medical Waste Tracking Act (42 USC Sec. 6992 - Subtitle J of SWDA)
NEPA	National Environmental Policy Act (42 USC Sec. 4321-4370a; 40 CFR 1500; EO 12114)
NHPA	National Historic Preservation Act (16 USC Sec. 470; 36 CFR 800; EO 11593)
NMSA	National Marine Sanctuaries Act (16 USC 1431; 15 CFR 922)
ODA	Ocean Dumping Act (33 USC 1401; 40 CFR 220)
OPA	Oil Pollution Act (33 USC 2701; 33 CFR 131; EO 12777)
OSHA	Occupational Safety and Health Act (29 USC Sec. 653; 29 CFR 1910, 1960; EO 12196)
PPA	Pollution Prevention Act (42 USC 13101; EO 12780, EO 12856, EO 12873)
RCRA	Resource Conservation and Recovery Act of 1976 (amended SWDA) (42 USC Sec. 6921 - Subtitle C of SWDA; 40 CFR 260)
RLPHRA	Residential Lead-Based Paint Hazard Reduction Act (42 USC 4822; 24 CFR 35)
SARA	Superfund Amendments and Reauthorization Act of 1986 (amended CERCLA and created EPCRA and DERP)
SDWA	Safe Drinking Water Act (42 USC Sec. 300f-300j-11; 40 CFR 141)
SWDA	Solid Waste Disposal Act of 1965 (42 USC Sec. 6901-6991) (42 USC Sec. 6941 - Subtitle D of SWDA; 40 CFR 256)
TSCA	Toxic Substances Control Act (PCBs, asbestos, radon, lead-based paint) (15 USC Sec. 2601-2654; 40 CFR 761)
UST	Underground Storage Tanks Program (a part of SWDA) (42 USC Sec. 6991 - Subtitle I of SWDA; 40 CFR 280)

* See also:

Storage of Non-DoD HM @ DoD Installations (10 USC 2692)
Base Closures & Realignment (10 USC 2687)
Construction Projects for Environmental Response Actions (10 USC 2810)
The Federal Tort Claims Act (28 USC 1346(b), 2671-2680)
The Federal Advisory Committee Act (5 USC Appendix 2)
The Proper Purpose Clause (31 USC 1301)
The Judgment Fund (31 USC 1304)
The Anti-Deficiency Act (31 USC 1341)
P.L. 104-113, §12(d)(1) (15 USC 272) (compliance w/consensus standards)
EO 12088- Federal Compliance with Pollution Control Standards
EO 12146- Management of Legal Resources
EO 12898- Environmental Justice

B.K. Schafer
1 Apr1998

Top 14 Environmental Laws

Pollutant Laws: Science Oriented w/Goal of Managing Harmful Chemical Substances Released Into The Environment:

1. CERCLA (cleanup of releases of hazardous substances -- new & old) (\$ + 10%)
2. RCRA (new hazardous wastes, old waste corrective action, garbage, USTs, used oil) (\$ + 10%)
3. TSCA (new chemicals, asbestos, PCBs, lead-based paint) (\$ + 10%)
4. FIFRA (insecticides, fungicides, rodenticides)
5. EPCRA (planning for and reporting of releases of hazardous substances)
6. SDWA (drinking water) (\$ + 10%)
7. FWPCA (releases into surface waters, wetlands, above-ground storage tanks)
8. CAA (ambient air quality, hazardous air pollutants, Title V permitting) (\$ + 10%)
9. OSHA (worker safety, civilian and military)
10. HMTA (transportation of hazardous substances, materials & wastes)

Planning Laws: Limiting The Impact Of Federal Actions On The Environment:

1. NEPA (general environmental planning -- CATEX, EAs, FONSI, EISs)
2. ESA (threatened and endangered species & their habitats)
3. NHPA (historic structures)
4. MMPA (protecting marine mammals from "takings" -- including harassment!)

Statutory Passages/Other Authorities

Waiving Federal Sovereign Immunity:

CAA: 42 USC Sec. 7418

CERCLA: 42 U.S.C.A. 9620

CWA: 33 USC Sec. 1323

EPCRA: E.O. 12856

ESA: 16 USC Sec. 1536

FIFRA: 7 USC Sec. 136p

HMTA: 49 USC Sec. 1804

NEPA: 42 USC Sec. 4321 & 42 USC Sec. 4332

NHPA: 16 USC Sec. 461 & 16 USC Sec. 462 & 16 USC Sec. 464

OSHA: 29 USC 653 & 29 USC Sec. 668

RCRA: 42 USC 6961 & 6991f

SDWA: 42 USC Sec. 300j 6

TSCA: 15 USC Sec. 2619 & 15 USC Sec. 2621

UST: 42 USC Sec. 6991f

Waivers of Federal Sovereign Immunity to Environmental Laws: Penalties Imposed by Federal & State Regulators

Penalties Imposable by Federal & State Regulators (whether the federal program is delegated to the State by U.S. EPA or not):

1. RCRA: hazardous waste and solid waste violations (42 USC Sec. 6961)
2. TSCA: lead-based paint abatement violations (15 USC Sec. 2688)
- 3.. SDWA: safe drinking water act violations (42 USC Sec. 300j6)

Penalties Imposable Only by Federal Regulators:

1. CERCLA: violations of cleanup agreements (i.e., Interagency Agreements or Federal Facility Agreements -- IAGs/FFAs) by federal facilities on the National Priorities List (42 USC Sec. 9609(a)(1)(E)).
2. CAA: clean air act violations (including field citation violations) (Legal Opinion by DOJ's Office of Legal Counsel, which held that if a federal agency is a "person" under an environmental law, and U.S. EPA can impose penalties against a "person" then U.S. EPA can impose environmental penalties against the federal agency.
3. UST: underground storage tank violations (including field citation violations) (Legal Opinion by U.S. EPA's Office of Federal Facility Enforcement, which applies the DOJ opinion to the setting of USTs. Currently DoD is contesting EPA's opinion, the Army & Navy are paying under protest, and the Air Force is in administrative litigation over the issue with EPA.

Interest on Penalties:

1. Cannot be paid absent a specific waiver of federal sovereign immunity to paying interest on penalties (see Library of Congress v. Shaw, 106 S.Ct. 2957 (1986)).
2. None of the "Top 14" environmental laws contain such a specific waiver to interest payment

HR 1119 (Pub.Law 105-85)
FY 98 DoD Authorization Act November 18, 1997

SEC. 325. ADMINISTRATIVE ACTIONS ADVERSELY AFFECTING MILITARY TRAINING OR OTHER READINESS ACTIVITIES.

(a) CONGRESSIONAL NOTIFICATION- Chapter 101 of title 10, United States Code, is amended by adding at the end the following new section:

` Sec. 2014. Administrative actions adversely affecting military training or other readiness activities

` (a) CONGRESSIONAL NOTIFICATION- Whenever an official of an Executive agency takes or proposes to take an administrative action that, as determined by the Secretary of Defense in consultation with the Chairman of the Joint Chiefs of Staff, affects training or any other readiness activity in a manner that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof, the Secretary shall submit a written notification of the action and each significant adverse effect to the head of the Executive agency taking or proposing to take the administrative action. At the same time, the Secretary shall transmit a copy of the notification to the President, the Committee on Armed Services of the Senate, and the Committee on National Security of the House of Representatives.

` (b) NOTIFICATION TO BE PROMPT- (1) Subject to paragraph (2), the Secretary shall submit a written notification of an administrative action or proposed administrative action required by subsection (a) as soon as possible after the Secretary becomes aware of the action or proposed action.

` (2) The Secretary shall prescribe policies and procedures to ensure that the Secretary receives information on an administrative action or proposed administrative action described in subsection (a) promptly after Department of Defense personnel receive notice of such an action or proposed action.

` (c) CONSULTATION BETWEEN SECRETARY AND HEAD OF EXECUTIVE AGENCY- Upon notification with respect to an administrative action or proposed administrative action under subsection (a), the head of
the Executive agency concerned shall--

` (1) respond promptly to the Secretary; and

` (2) consistent with the urgency of the training or readiness activity involved and the provisions of law under which the administrative action or proposed administrative action is being taken, seek to reach an agreement with the Secretary on immediate actions to attain the objective of the administrative action or proposed administrative action in a manner which eliminates or mitigates the adverse effects of the administrative action or proposed administrative action upon the training or readiness activity.

` (d) MORATORIUM- (1) Subject to paragraph (2), upon notification with respect to an administrative action or proposed administrative action under subsection (a), the administrative action or proposed administrative action shall cease to be effective with respect to the Department of Defense until the earlier of--

` (A) the end of the five-day period beginning on the date of the notification; or

` (B) the date of an agreement between the head of the Executive agency concerned and the Secretary as a result of the consultations under subsection (c).

` (2) Paragraph (1) shall not apply with respect to an administrative action or proposed administrative action if the head of the Executive agency concerned determines that the delay in enforcement of the administrative action or proposed administrative action will pose an actual threat of an imminent and substantial endangerment to public health or the environment.

`(e) EFFECT OF LACK OF AGREEMENT- (1) If the head of an Executive agency and the Secretary do not enter into an agreement under subsection (c)(2), the Secretary shall submit a written notification to the President who shall take final action on the matter.

`(2) Not later than 30 days after the date on which the President takes final action on a matter under paragraph (1), the President shall submit to the committees referred to in subsection (a) a notification of the action.

`(f) LIMITATION ON DELEGATION OF AUTHORITY- The head of an Executive agency may not delegate any responsibility under this section.

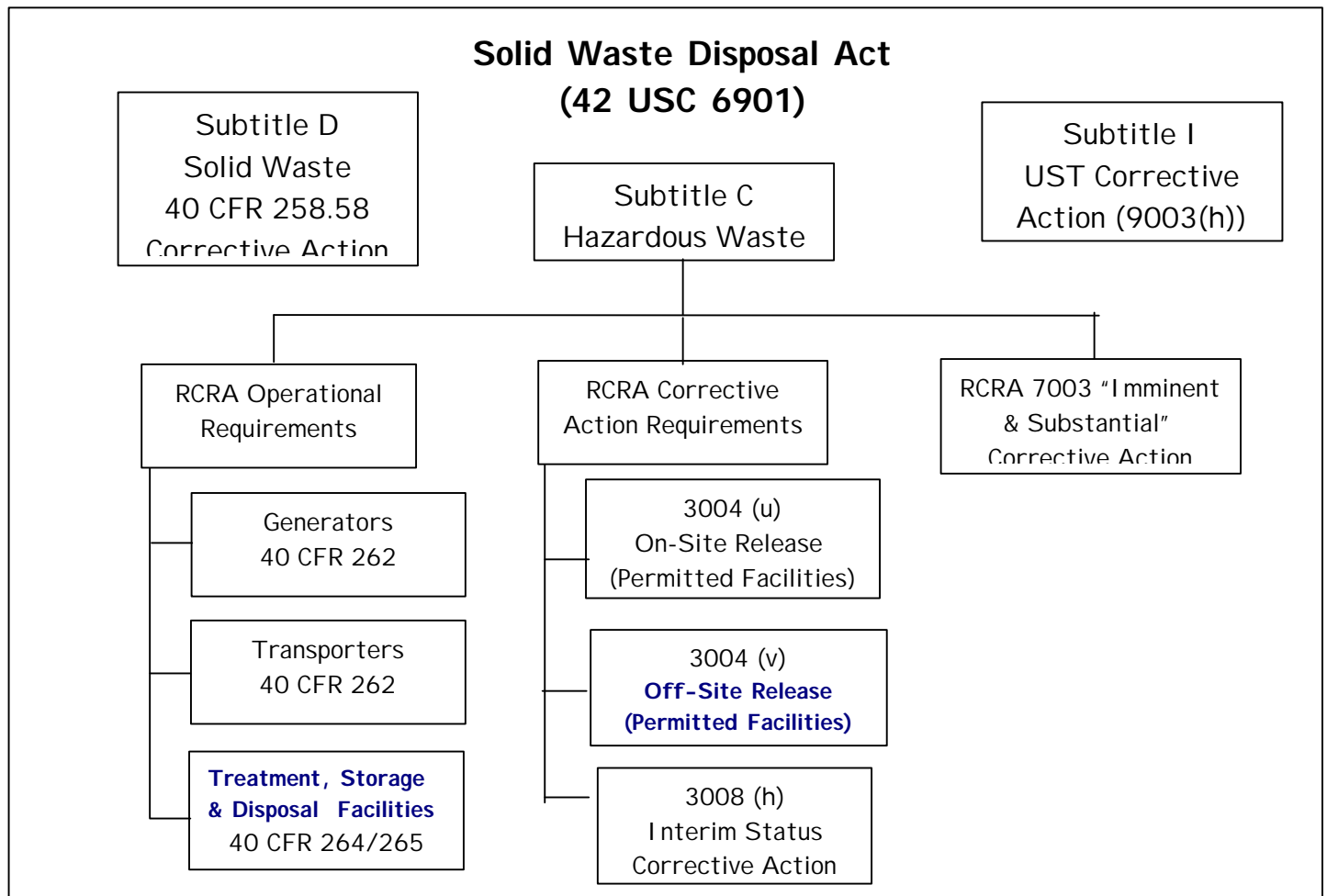
`(g) DEFINITION- In this section, the term `Executive agency' has the meaning given such term in section 105 of title 5, except that the term does not include the General Accounting Office.'

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such chapter is amended by adding at the end the following new item: `2014. Administrative actions adversely affecting military training or other readiness activities.'

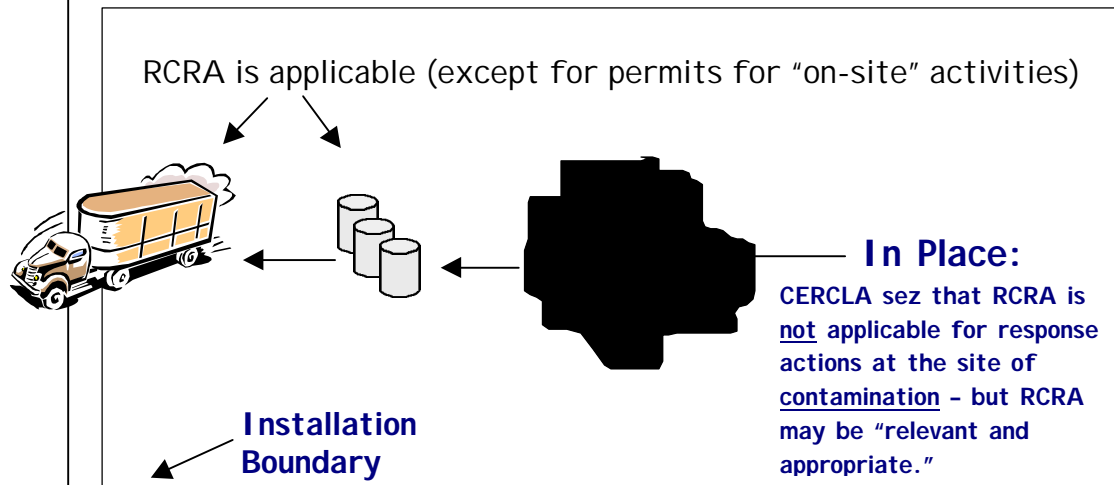
10 USC Sec. 2703. ENVIRONMENTAL RESTORATION ACCOUNTS

(f) PAYMENTS OF FINES AND PENALTIES.--NONE OF THE FUNDS APPROPRIATED TO THE ENVIRONMENTAL RESTORATION ACCOUNT, DEFENSE, FOR FISCAL YEARS 1995 THROUGH 1999, OR TO ANY ENVIRONMENTAL RESTORATION ACCOUNT OF A MILITARY DEPARTMENT FOR FISCAL YEARS 1997 THROUGH 1999, MAY BE USED FOR THE PAYMENT OF A FINE OR PENALTY

(INCLUDING ANY SUPPLEMENTAL ENVIRONMENTAL PROJECT CARRIED OUT AS PART OF SUCH PENALTY) IMPOSED AGAINST THE DEPARTMENT OF DEFENSE OR A MILITARY DEPARTMENT UNLESS THE ACT OR OMISSION FOR WHICH THE FINE OR PENALTY IS IMPOSED ARISES OUT OF AN ACTIVITY FUNDED BY THE ENVIRONMENTAL RESTORATION ACCOUNT CONCERNED AND THE PAYMENT OF THE FINE OR PENALTY HAS BEEN SPECIFICALLY AUTHORIZED BY LAW.



RCRA Penalties @ CERCLA Site

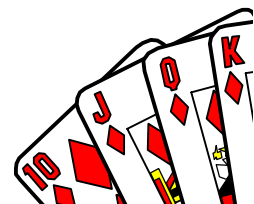


CERCLA "trumps" RCRA*:

But only in terms of which program
(by law and by regulation)
incorporates the other & more importantly
in terms of effectiveness.

As an ARAR, RCRA - including the substance
of the corrective action program (and some
of the procedure) - must be satisfied while
doing CERCLA (unless waived).

*corrective action





Prescription Strength RCRA Corrective Action Antacid

Dear Suffering Federal Facility Lead Agent:

This prescription contains the ingredients necessary to respond to an attack of RCRA Corrective Action. This malady involves the insistence by some regulators that you are powerless under CERCLA, and that RCRA Corrective Action trumps what little strength CERCLA might give you. In fact, CERCLA is more powerful than RCRA. You have within you the ability to call upon this power, and to respond to such onslaughts if you keep this prescription at your side when symptoms arise.

CERCLA Sec. 104: President has power to respond to releases (no limits based on NPL).
CERCLA Sec. 115: President can delegate his power to respond (no limits based on NPL).
E.O. 12580, Sec. 2.d.: President delegated to DoD for facility & vessel releases (no limits based on NPL).
DERP 10 USC 2701: Congress gave DoD power to respond to releases (no limits based on NPL).
CERCLA Sec. 121: DoD selects cleanup & can waive ARARs, w/o permits (few limits based on NPL).
CERCLA Sec. 120: DoD must comply with CERCLA & EPA Regs & Guidance:

- RCRA Corrective Action requirements are most important ARAR.
- RCRA Corrective Action controls sites not addressed by CERCLA.
- RCRA Corrective Action controls RCRA "Regulated Units" (but see below*).

40 CFR 300.5: NCP definition of "lead agent" = DoD, whether on the NPL or not!
Werlein v. U.S., 746 F.Supp. 887 & *MESS v. Perry*, 47 F.3d 325: CERCLA 113(h)=limited judicial review
U.S. v. Colorado, 990 F.2d 1565: A RCRA "Regulated Unit" case -- RCRA & CERCLA must both be satisfied but little guidance on how to achieve this; DOJ = "at odds" with other appellate decisions & other courts of appeals have treated it as an "anomaly that is limited to facts." See MESS!

NCP Prop. Preamble (53 FR 51445): RCRA Correction Action is a substantive CERCLA ARAR.
NCP Final Preamble (55 FR 8689): Ditto!
RCRA Prop. Corr. Act. Rule (55 FR 30802): Corrective Action is a substantive CERCLA ARAR!
RCRA Prop. Corr. Act. Rule (55 FR 30852): CERCLA NCP studies can satisfy RCRA!
RCRA Prop. Corr. Act. Rule (55 FR 30853): CERCLA authorities can be used at RCRA sites!
RCRA Prop. Corr. Act. Rule (55 FR 30857): IAGs will coordinate RCRA & CERCLA activities!
RCRA Prop. Corr. Act. Rule (55 FR 30802): DoD's IRP work product can be used to satisfy RCRA!

Fed. Facil. Comp. Act (P.L. 102-386): Did not change CERCLA, only RCRA SW/HW \$\$ (not UST!).
FFCA Policy (58 FR 49044): Footnote #2 = E.O. 12580 tells who can issue orders at CERCLA sites.
CERCLA Sec. 109: CERCLA penalties to EPA only for Sec. 120 FFA violations (i.e., NPL IAGs).
*RCRA Prop. Rule 59 FR 55778 (55784): alternate legal authorities (e.g., CERCLA) can be used vice RCRA.

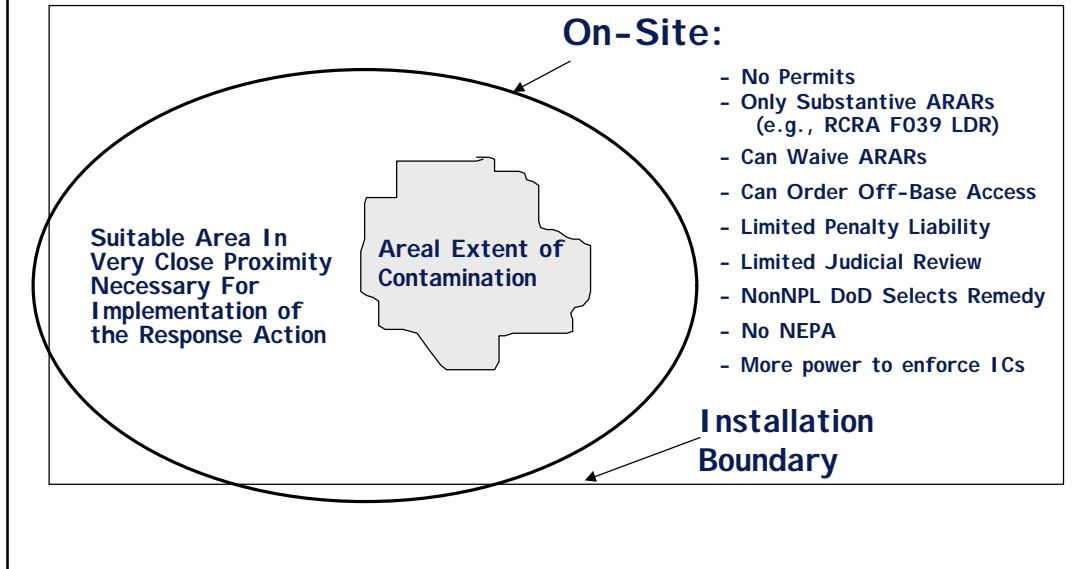
40 CFR 268.1(d): RCRA's LDR requirements can be waived per CERCLA 121(d)(4)!
RCRA Corr. Act. ANPR (61 FR 19432): RCRA Corrective Action can defer cleanup to CERCLA!
RCRA Corr. Act. ANPR (61 FR 19432): Coordination of cleanup is necessary when RCRA/CERCLA overlap!
OSWER/OECA 24 Sep 96 Ltr: CERCLA Cleanups can even satisfy RCRA TSD Closure requirements!



Mr. B.K. Schafer, Senior Counsel
OAGC(I&E)
General Counsel of the Navy
schafer.bernard@hq.navy.mil

5 Feb 98

Lead Agent CERCLA Authority



DoD has CERCLA authority because of CERCLA 104 and 115, and E.O. 12580, Sec. 2d, DERP (10 USC Sec. 2701), and the NCP (40 CFR Sec. 300).

- No Permits: CERCLA 121(e) [42 USC 9621(e)]
- Only Substantive ARARs: CERCLA 121(e) [42 USC 9621(e)] & NCP
- Waive ARARs: CERCLA 121(d)(4) [42 USC 9621(d)(4)]
- Order Off-Base Access: CERCLA 104(e)(5) [42 USC 9604(d)(4)]
- Limited Penalty Liability: CERCLA 109(a)(1)(E) [42 USC 9609(a)(1)(E)]
- Limited Judicial Review: CERCLA 113(h) [42 USC 9613(h)]
- Non-NPL DoD Selects the Remedy CERCLA 120.
- No NEPA (CERCLA is functional equivalent; DOJ & EPA agree)
- At transferring installations, an authority independent of real estate authority (due to easement enforcement authority) to enforce institutional controls

Rocky Mountain Arsenal & The Altus AFB Decision

RMA

- At issue was a TSD (the Army sent in RCRA Part A & B – unit was not a SWMU).
- Court never holds that RCRA trumps CERCLA (or the NPL status of RMA).
- DOJ does not view it as binding nationally but instead an “anomaly limited to its facts.”
- EPA does not view it as binding nationally (EPA not deferring its NPL sites to states due to RMA)

Altus:

- Non-NPL facility being properly cleaned up under CERCLA (state was supportive).
- Despite negotiations, EPA insisted RCRA process would be followed (e.g., permits, judicial review).
- USAF was prepared to work with a unilateral order, but terms were harsh (e.g., SWMUs & testing).
- EPA judge holds RCRA + CERCLA must be satisfied; of 12 contested SWMUs, only 4 were legit; testing **not** required of **all** App. 8 hazardous constituents.

